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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. ECONOMIC JUSTIFICATION IS NOT THE SOLE METHOD OF ESTABLISHING THAT AN EMPLOYEE BENEFIT PLAN IS "BONA FIDE" WITHIN THE MEANING OF SECTION 4(f)(2) OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT	7
A. The § 4(f)(2) Defense Is Available To All Bona Fide Employee Benefit Plans	7
B. The Language And Legislative History Of § 4(f)(2) Do Not Support A Restrictive Reading Of The Exception	9
II. A BONA FIDE EMPLOYEE BENEFIT PLAN IS PROTECTED BY SECTION 4(f)(2) UNLESS IT IS A SUBTERFUGE TO EVADE THE ADEA	12
A. This Court's Previous Ruling That An Employee Benefit Plan Which Predates The ADEA Need Not Show Cost Or Other Business Justification To Qualify For The § 4(f)(2) Exclusion Was Not Disturbed By The 1978 ADEA Amendment	13
B. A Plan Which Is Justified By Age-Related Cost Factors Cannot Be A Subterfuge	15

TABLE OF CONTENTS—Continued

	Page
III. ONCE AN EMPLOYER HAS ARTICULATED A LEGITIMATE, NONDISCRIMINATORY BUSINESS REASON FOR MAINTAINING AN EMPLOYEE BENEFIT PLAN PROVIDING LESSER OR NO BENEFITS TO OLDER EMPLOYEES, THE PLAINTIFF HAS THE BURDEN TO PROVE THAT THE PLAN IS A SUBTERFUGE TO EVADE THE PURPOSES OF THE ADEA	19
A. A Plaintiff's Prima Facie Case May Be Rebutted With Legitimate Reasons For The Employer's Conduct. The Plaintiff Must Then Prove Pretext	19
B. This Burden Of Proof Scheme Applies To The ADEA, With The Burden Remaining On The Plaintiff To Prove That The Employer's Legitimate Reasons Were In Fact A Subterfuge	21
CONCLUSION	27

TABLE OF AUTHORITIES

Cases	Page
Ackerman v. Diamond Shamrock Corporation, 670 F.2d 66 (6th Cir. 1982)	20
Alford v. City of Lubbock, Texas, 664 F.2d 1263 (5th Cir. 1982), *cert. denied*, 456 U.S. 975 (1982)	5
Betts v. Hamilton County Board of Mental Retardation, 631 F. Supp. 1198 (S.D. Ohio 1986)	4, 5
Betts v. Hamilton County Board of Mental Retardation, 848 F.2d 692 (6th Cir. 1988)	5
Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) (per curiam)	3, 25
Braunstein v. Commissioner of Internal Revenue, 374 U.S. 65 (1963)	10
Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974)	9, 10, 11
Carpenter v. Continental Trailways, 635 F.2d 578 (6th Cir. 1980), *cert. denied*, 451 U.S. 986 (1981)	22, 23
Cipriano v. Board of Education of City School District, 785 F.2d 51 (2d Cir. 1986)	9, 13, 18, 19, 26
Crosland v. Charlotte Eye, Ear And Throat Hospital, 686 F.2d 208 (4th Cir. 1982)	5, 7, 17, 24, 25
Dale v. Chicago Tribune Company, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 954 (1987)	22
Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981)	20
EEOC v. Bordens, Inc., 724 F.2d 1390 (9th Cir. 1984)	8
EEOC v. Cargill, 855 F.2d 682 (10th Cir. 1988)	5, 15
EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988)	5, 14, 15
EEOC v. Home Insurance Co., 672 F.2d 252 (2d Cir. 1982)	19, 26
EEOC v. State of Maine, 644 F.Supp. 223 (D. Me.), *aff'd mem.* 823 F.2d 542 (1st Cir. 1987)	5, 14, 15
EEOC v. Westinghouse, No. 86-1226 (3d Cir. November 30, 1988)	19
EEOC v. Westinghouse, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984)	3, 8

TABLE OF AUTHORITIES—Continued

	Page
Furnco Construction Corporation v. Waters, 438 U.S. 567 (1978)	3, 21
Harbison-Walker Refractories v. Brieck, No. 87-271 (decision pending)	3
International Brotherhood of Electrical Workers, Local 1439, AFL-CIO v. Union Electric Company, 585 F.Supp. 261 (E.D. Mo. 1984), *aff'd*, 761 F.2d 1257 (8th Cir. 1985)	5, 15
Jensen v. Gulf Oil Refining & Marketing Co., 623 F.2d 406 (5th Cir. 1980)	8
Johnson v. Transportation Agency, Santa Clara County, California, 107 S.Ct. 1442 (1987)	21
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979)	22
Lorillard v. Pons, 434 U.S. 575 (1978)	3
McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973)	*passim*
McLaughlin v. Richland Shoe Co., 108 S.Ct. 1677 (1988)	3
Patterson v. Independent School District #709, 742 F.2d 465 (8th Cir. 1984)	19
Potenze v. New York Shipping Association, Inc., 804 F.2d 235 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1955 (1987)	18, 19
Shell Oil Co. v. Dartt, 434 U.S. 99 (1977)	3
Sierra Club v. Secretary of Army, 820 F.2d 513 (1st Cir. 1987)	14
Smart v. Porter Paint Co., 630 F.2d 490 (7th Cir. 1980)	8, 19
Smith v. Farah Manufacturing Co., Inc., 650 F.2d 64 (5th Cir. 1981)	22
Steckl v. Motorola, Inc., 703 F.2d 392 (9th Cir. 1983)	22
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	*passim*
Thompson v. Chrysler Corporation, 569 F.2d 989 (6th Cir. 1978)	23
Trans World Airlines v. Thurston, 469 U.S. 111 (1985)	3
United Air Lines v. McMann, 434 U.S. 192 (1977)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983)	3
Wards Cove Packing Company, Inc. v. Atonio, No. 87-1387, *cert. granted*, 56 U.S.L.W. 3894 (June 28, 1988)	3
Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777 (1988)	3, 20
Statutes	
Age Discrimination in Employment Act (1967), 29 U.S.C. § 621 *et seq.*	2, 7
Section 4(f)(1), 29 U.S.C. § 623(f)(1)	22
Section 4(f)(2), 29 U.S.C. § 623(f)(2)	*passim*
Section 4(f)(3), 29 U.S.C. § 623(f)(3)	22
29 U.S.C. § 623(a)(1)	7
Pub.L. 90-202, 81 Stat. 602 (1967)	13
Pub.L. No. 95-256, § 2(a), 92 Stat. 189 (1978)	14
Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*	8
29 U.S.C. § 1002(1) (1988)	8
Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*	2, 3
Ohio Rev. Code § 145.35 (1933)	4, 5
Rules and Regulations	
Department of Labor's 1969 Interpretative Bulletin, 34 Fed. Reg. 9709 (1969), codified at 29 C.F.R. § 860.120 (1969)	12, 18
44 Fed. Reg. 37974, republished as 29 C.F.R. § 1625.10, 52 Fed. Reg. 23811 (June 25, 1987)	18
Congressional History	
Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 24-30 (1967)	11, 16
H.R. Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in* 1967 U.S. Code Cong. & Admin. News 2213	11, 16

TABLE OF AUTHORITIES—Continued

	Page
113 Cong. Rec. 31255 (1967)	16, 17
113 Cong. Rec. 34,738-754 (1967)	11, 16
124 Cong. Rec. S4450 (1978)	12, 18
Miscellaneous	
1 Sutherland on Statutory Construction, § 22.33 (4th ed. 1985)	14

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On Appeal from the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF APPELLANT

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae in support of the Appellant. The written consents of all parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employ-

ment practices. Its membership comprises a broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its trade association members, are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, as well as other equal employment statutes and regulations. As employers, virtually all of EEAC's members and member constituencies maintain employee benefit plans for their employees over and above normal wages and salaries. Many of these plans are products of collective bargaining with employee representatives. As potential respondents to charges of discrimination pursuant to the ADEA and Title VII, EEAC's members are interested in the extent to which these benefit plans may be attacked as discriminatory notwithstanding the exception for bona fide benefit plans set forth in § 4(f)(2) of the ADEA.

Thus, the issues presented in this appeal are extremely important to the nationwide constituency which EEAC represents. The court below held that the only way an employee benefit plan can qualify for the § 4(f)(2) defense is if the employer proves it is based on age-related cost factors. This conclusion unduly restricts the broad language of the exclusion, which authorizes action taken pursuant to a bona fide employee benefit plan as long as the plan is not a subterfuge to evade the ADEA. Further, by placing the full burden of proving lack of discriminatory motive on the defendant, the decision below

conflicts with this court's holding in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), reaffirmed in *Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777, 2784 (1988), that the ultimate burden of persuasion is always with the plaintiff. *See also Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978) (per curiam) (inappropriate to require defendant employer to prove "absence of discriminatory motive").

Because of its interest in the application of the nation's civil rights laws, EEAC has filed over 240 briefs as amicus curiae in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this amicus activity, EEAC has participated in several cases involving § 4(f)(2) of the ADEA, including *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984). Furthermore, a number of the other cases in which EEAC has participated have involved the proper interpretation of the ADEA. *See, e.g., Harbison-Walker Refractories v. Brieck*, No. 87-271 (decision pending); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *Lorillard v. Pons*, 434 U.S. 575 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977). *See also McLaughlin v. Richland Shoe Co.*, 108 S.Ct. 1677 (1988) (standard for willful violations under the FLSA, Equal Pay Act and ADEA). In addition, ADEA has filed briefs in a number of cases addressing the burden of proof under Title VII of the Civil Rights Act of 1964, including *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777 (1988); *Wards Cove Packing Company, Inc. v. Atonio*, No. 87-1387, *cert. granted*, 56 U.S.L.W. 3894 (June 28, 1988).

STATEMENT OF THE CASE

The facts set forth herein are taken from the district court's decision below. *Betts v. Hamilton County Board of Mental Retardation*, 631 F.Supp. 1198, 1201 (S.D. Ohio, 1986). Appellant, the Public Employees Retirement System of Ohio ("PERS"), provides retirement benefits to most of Ohio's public employees. In 1984, appellee June Betts had been employed as a speech pathologist by the Hamilton County Board of Mental Retardation and Developmental Disabilities ("County Board") for approximately five years when she voluntarily transferred to another position because of poor performance. 631 F.Supp. at 1201. By September 1984, Betts had failed to perform satisfactorily in her new job and accepted an even lower-paying position as a Teachers' Aid. *Id.* It appears that Betts' poor performance was due to medical reasons, and in May 1985, when she could not perform her duties as a Teachers' Aid, Betts was told that she could voluntarily retire or be placed on unpaid medical leave. *Id.* Betts was sixty-one years old. *Id.*

Under the terms of Ohio's public pension law, Betts was ineligible for disability retirement benefits. Ohio's statute provides:

> Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and *has not attained age sixty* and is not receiving disability benefits under any other Ohio state or municipal retirement program.

Ohio Rev. Code § 145.35 (1933) (emphasis supplied). Accordingly, PERS denied Betts' application for disability retirement. 631 F.Supp. at 1201.

Betts filed an age discrimination charge with the EEOC against PERS and the County Board. The district

court granted Betts' motion for summary judgment and denied PERS' cross-motion for summary judgment. The court concluded that Ohio Rev. Code § 145.35 violated the ADEA by denying benefits to employees over sixty, and "assume[d] that the plan was purposefully drafted to have that effect." 631 F.Supp. at 1202. Moreover, the court found that the PERS plan was not exempted by § 4(f)(2) of the ADEA for a number of reasons, one being that the plan was not justified by significant cost considerations.

The U.S. Court of Appeals for the Sixth Circuit affirmed. 848 F.2d 692 (6th Cir. 1988). Holding that this Court's decision in *United Air Lines v. McMann*, 434 U.S. 192 (1977), had been "expressly repudiated" when Congress amended the ADEA to prohibit mandatory retirement, *id.* at 694, the Sixth Circuit required the employer to prove that there was cost or other economic justification to support the denial of disability benefits to employees over sixty. *Id.* at 695. As Judge Wellford pointed out in his dissenting opinion, several other circuits have held to the contrary. *Betts v. Hamilton County Board of Mental Retardation*, 848 F.2d 692, 697-98 (6th Cir. 1988) (Wellford, J., dissenting). *See EEOC v. County of Orange*, 837 F.2d 420 (9th Cir. 1988); *EEOC v. Cargill*, 855 F.2d 682 (10th Cir. 1988); *EEOC v. State of Maine*, 644 F.Supp. 223 (D. Me. 1986), *aff'd mem.*, 823 F.2d 542 (1st Cir. 1987); *International Brotherhood of Electrical Workers, Local 1439, AFL-CIO v. Union Electric Company*, 585 F.Supp. 261 (E.D. Mo. 1984), *aff'd*, 761 F.2d 1257 (8th Cir. 1985). *See also Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208, 213 (4th Cir. 1982) (dicta); *Alford v. City of Lubbock, Texas*, 664 F.2d 1263, 1271 (5th Cir. 1982), *cert. denied*, 456 U.S. 975 (1982) (dicta).

SUMMARY OF ARGUMENT

Under the Sixth Circuit's interpretation, an employee benefit plan would qualify for the § 4(f)(2) exclusion *only* if the employer can prove that the plan's terms are justified by directly related age-based cost factors. This highly restrictive reading is not supported by either the plain language of the ADEA or its legislative history. Further, the PERS plan predates the ADEA; thus, under this Court's still-viable decision in *McMann*, it could not have been conceived as a subterfuge to evade the statute and therefore falls within the § 4(f)(2) exclusion.

A bona fide employee benefit plan which provides differing benefits to older and younger workers is not unlawful under the ADEA unless it is a subterfuge to evade the ADEA's purposes. 29 U.S.C. § 623(f)(2). Cost considerations are not the only justification which can be advanced to meet the employer's burden. Often, evidence produced by the employer to explain its benefit plan will demonstrate the plan's origins, which may include the cost considerations or other reasons underlying the plan's terms, and as a practical matter establish lack of subterfuge.

It should not, however, be the employer's burden to *prove* that the plan is not a subterfuge. The term "subterfuge," which implies intentional evasion, means the same as "pretext for discrimination." *McMann*, 434 U.S. at 203 ("[A] subterfuge is a scheme, plan, stratagem, or artifice of evasion"). Under the formulation used by this Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), and its progency, the ultimate burden of proving intentional discrimination never shifts from the plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Thus, after the employer has articulated a legitimate, nondiscriminatory reason for the plan's terms, the burden should shift back to the plaintiff to show that the

plan is in fact a subterfuge to evade the ADEA. Accordingly,

> [A] defendant may avoid liability [under § 4(f)(2)] . . . by establishing that the provision under which [plaintiff] was excluded was not a subterfuge to evade the purposes of the Act . . . [T]his may be done by proving that the provision was motivated by a legitimate business or economic purpose . . . By way of rebutting or avoiding this affirmative defense, it will of course be open to the claimant to attempt to show that instead of a business or economic purpose, the actual motivation for her exclusion was an ongoing 'scheme' . . . designed to thwart the purposes of the ADEA.

Crosland v. Charlotte Eye, Ear And Throat Hospital, 686 F.2d at 215 (citation omitted).

ARGUMENT

I. ECONOMIC JUSTIFICATION IS NOT THE SOLE METHOD OF ESTABLISHING THAT AN EMPLOYEE BENEFIT PLAN IS "BONA FIDE" WITHIN THE MEANING OF SECTION 4(f)(2) OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

A. The § 4(f)(2) Defense Is Available To All Bona Fide Employee Benefit Plans.

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, generally prohibits discrimination in "compensation, terms, conditions, or privileges of employment, because of . . . age." 29 U.S.C. § 623(a)(1). However, the ADEA's coverage is not unlimited. On the contrary, the ADEA specifically excludes actions taken pursuant to a bona fide employee benefit plan. Section 4(f)(2) of the ADEA provides:

> (f) It shall not be unlawful for an employer, employment agency, or labor organization—
>
> • • • •

> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section [12(a)] of this [Act.]

29 U.S.C. § 623(f)(2). The language of section 4(f)(2) is clear and unambiguous. To come within this exemption, three requirements must be satisfied: (1) there must be a bona fide employee benefit plan; (2) the employer must observe the terms of that plan; and (3) the plan must not be a subterfuge to avoid the purposes of the ADEA. *See, e.g., EEOC v. Westinghouse Electric Corp.*, 725 F.2d at 223; *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984); *Smart v. Porter Paint Co.*, 630 F.2d 490, 493 (7th Cir. 1980).[1]

The Sixth Circuit would impose additional requirements on the availability of § 4(f)(2) which would greatly limit the applicability of the exemption. In essence, the Sixth Circuit determined that when a plan offers lesser or no benefits to older employees, the § 4(f)(2) defense is available only where the cost of providing equal benefits to an older worker is greater because of age-related factors. This conclusion contradicts the plain language of

[1] An employee benefit plan is deemed to be bona fide if it "exists and pays benefits." *See United Air Lines, Inc. v. McMann*, 434 U.S. 192, 194 (1977); *Smart v. Porter Paint Co.*, 630 F.2d at 494; *Jensen v. Gulf Oil Refining & Marketing Co.*, 623 F.2d 406, 413 (5th Cir. 1980). For example, employee welfare benefit plans are defined by the Employee Retirement Income Security Act of 1974 as "any plan, fund, or program . . . maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, *disability*, death or unemployment, or vacation benefits . . ." 29 U.S.C. § 1002(1) (1988) (emphasis supplied).

the ADEA as well as the legislative intent underlying the exemption.

Any argument that a plan is disqualified from being a "bona fide employee benefit plan" solely *because* it provides differing benefits to older and younger workers misses the point. As discussed below, the fact that a plan may pay less benefits to or exclude older workers goes to the issue of whether the plan is a subterfuge to evade the ADEA, not to the genuineness of the plan itself. *See, e.g., Cipriano v. Board of Education of City School District*, 785 F.2d 51, 55 (2d Cir. 1986) ("The way the plan is structured affects only whether it might be a subterfuge to evade the purposes of the Act, not whether it qualifies generically for the shelter of § 4(f)(2)").[2]

B. The Language and Legislative History Of § 4(f)(2) Do Not Support A Restrictive Reading Of The Exception.

There is no support in the text or legislative history of the ADEA for the Sixth Circuit's narrow view of the purpose of the employee benefit plan exemption. Certainly, the legislative history indicates that one of the factors which may have motivated Congress to include the benefit plan exemption was a concern that high benefit costs might discourage employers from hiring older workers. This concern, however, in no way supports the Sixth Circuit's requirement of a cost justification before § 4(f)(2) can be applied.

The intent of § 4(f)(2), as its plain language suggests, was totally to exempt bona fide employee benefit

[2] As the Court of Appeals for the Fifth Circuit concluded, "The key phrase is 'employee benefit plan.' The words, 'retirement, pension, or insurance,' are added in a clearly descriptive sense, not excluding other kinds of employee benefit plans if, conceivably, there could be any." *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974).

plans from the coverage of the Act unless there is a showing that the plan is a subterfuge to evade the ADEA. The starting point for an analysis of the subterfuge question should be this Court's oft-cited pronouncement in *United Air Lines, Inc. v. McMann*:

> In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion. In the context of [the ADEA], "subterfuge" must be given its ordinary meaning and we must assume Congress intended it in that sense.

434 U.S. at 203 (1977). Words such as "scheme, plan, stratagem, or artifice of evasion" carry strong connotations of intent or purpose. Thus, the plain language of the statute, coupled with this Court's definition of "subterfuge," call merely for an examination of whether a particular benefit plan conceals purposeful discrimination on the basis of age.

In view of this clear language, there is no reason to turn to the legislative history. *McMann*, 434 U.S. at 198-99 ("[L]egislative history . . . is irrelevant to an unambiguous statute."). The Fifth Circuit likewise reached this conclusion in *Brennan v. Taft Broadcasting Company*, 500 F.2d 212, when considering a profit sharing plan which, it was argued, was not eligible for the § 4(f)(2) exclusion because it had no age-related cost factors. Citing this Court's decision in *Braunstein v. Commissioner of Internal Revenue*, 374 U.S. 65 (1963), the Fifth Circuit found first that there was no reason to search the legislative history for a "Congressional purpose" when the statutory language is clear. Second, the court observed the "practical difficulty" of attempting to determine in each individual case whether the challenged conduct is "within the Congressional purpose." Third, the court noted that a statute is of little use in warning the public of prohibited conduct if clear language is not conclusive, stating, "It is hardly reasonable

to require persons affected by legislation to delve into voluminous and conflicting collections of speeches to determine whether what a statute plainly says is what it really means." 500 F.2d at 217.

Moreover, the legislative history supports the view that a cost defense is not mandatory under § 4(f)(2). For example, during the Senate hearings on the ADEA, Senator Javits recommended that "the age discrimination law should not be used as the place to fight the pension battle but that *we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treatment under pension plans a condition of that employment.*" Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (1967) (emphasis added).

Similarly, Congressman Dominick Daniels, a member of the General Subcommittee on Labor which held the hearings on the ADEA in the House, stated, "[T]he bill takes into full consideration . . . the problem of employers in the field of pension and other benefit plans. The bill *would permit the hiring of older workers without requiring that they necessarily be included in all employee benefit plans.*" 113 Cong. Rec. 34746 (1967) (emphasis added). In addition, the House Education and Labor Committee stated in its report on the ADEA, "[Section 4(f)(2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. *This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans.*" H.R. Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in* 1967 U.S. Code Cong. & Admin. News 2213, 2217 (1967) (emphasis added).

The legislative history of the ADEA thus does not suggest that a plan must be justified by specific age-related

cost considerations in order to qualify for the exemption. To the contrary, both the plain language of § 4(f)(2) and its legislative history carve out a broad exception which expressly allows employers to treat older workers differently than younger workers under employee benefit plans.

It is true that the Department of Labor's 1969 Interpretative Bulletin ("I.B.") provided that:

> [a] retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

34 Fed. Reg. 9709 (1969), codified as 29 C.F.R. § 860.120. This language, however, is not exclusive; thus it clearly does not establish an "equal cost" method as the sole means of qualifying for § 4(f)(2).

When Senator Javits quoted this language in Congress prior to the 1978 ADEA amendments, he likewise did not identify the "equal cost" method as exclusive. 124 Cong. Rec. S4450-51 (March 23, 1978). Even if he had, of course, these remarks would have been made long after passage of the ADEA and thus would not form part of the ADEA's legislative history. *United Air Lines, Inc. v. McMann*, 434 U.S. 200 n. 7 ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.").

II. A BONA FIDE EMPLOYEE BENEFIT PLAN IS PROTECTED BY SECTION 4(f)(2) UNLESS IT IS A SUBTERFUGE TO EVADE THE ADEA.

As stated above, the threshold requirement for eligibility for the § 4(f)(2) exclusion is that the challenged employee benefit plan be a "bona fide employee benefit plan" in that it exists and pays substantial benefits to

covered employees. *Cipriano v. Board of Education*, 785 F.2d at 54. The only limitation placed on § 4(f)(2) by Congress is that the plan may not be a subterfuge to evade the ADEA.

Usually, evidence produced by the employer in explaining its bona fide benefit plan will also establish that the plan was not designed as a subterfuge to evade the purposes of the ADEA. If, as here, the plan predates the act, it cannot be a subterfuge. *McMann*, 434 U.S. at 203. In addition, where the employer demonstrates that the plan is based on age-related cost factors, or is otherwise justified, for example by some business purpose, it can be concluded that the employer did not intend to evade the Act.

A. This Court's Previous Ruling That An Employee Benefit Plan Which Predates The ADEA Need Not Show Cost Or Other Business Justification To Qualify For The § 4(f)(2) Exclusion Was Not Disturbed By the 1978 ADEA Amendment.

In *United Air Lines v. McMann*, this Court ruled on the precise question at issue here—whether an employee benefit plan which existed prior to enactment of the ADEA must nevertheless demonstrate a business or economic purpose for differentiating between older and younger workers in order to be excluded from the ADEA's prohibitions by virtue of § 4(f)(2). In deciding whether or not a retirement plan established in 1941 and containing a mandatory retirement age was a "subterfuge" to evade the Act, this Court concluded that "we find nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before its passage, or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans." *McMann*, 434 U.S. at 203.[3]

[3] The Age Discrimination In Employment Act, 29 U.S.C. §§ 621-634, was enacted in 1967. Pub.L. 90-202, Dec. 15, 1967, 81 Stat. 602.

Following this Court's *McMann* decision, which noted that the ADEA could not be interpreted to prohibit involuntary retirement "without a clear, unambiguous expression in the statute," 434 U.S. at 199, Congress amended § 4(f)(2) by adding a provision explicitly barring mandatory retirement plans from § 4(f)(2) protection.[4] Congress did not amend the remaining language of § 4(f)(2) to require any particular proof, such as a business justification, for other plans which come within § 4(f)(2).[5]

Had Congress wished to nullify *McMann* in its entirety, it could easily have done so by further amending § 4(f)(2). *EEOC v. County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988) (Congress could have modified the definition of subterfuge and added a cost justification requirement); *EEOC v. State of Maine*, 644 F.Supp. 223, 226 (D.Me. 1986) ("If Congress had wished to state that a plan's chronology alone would not satisfy the 'subterfuge' prong of section 4(f)(2), it could have plainly said so."). Since the amendment only adds language providing that mandatory retirement plans are not protected by § 4(f)(2), it can be assumed that Congress

[4] The amendment reads:

> Sec. 2.(a) Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(f)(2)) is amended by inserting after "individual" a comma and the following: "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual." Pub.L. No. 95-256, § 2(a), 92 Stat. 189 (April 6, 1978).

[5] The amendment did not reiterate the language which this Court construed in *McMann*; it merely added an additional restriction prohibiting mandatory retirement. Under traditional canons of statutory construction, even if the amendment had repeated the § 4(f)(2) language, it would have to be considered as a "continuation of the original law." 1 Sutherland on Statutory Construction, § 22.33 (4th ed. 1985). *See also Sierra Club v. Secretary of Army*, 820 F.2d 513, 522 (1st Cir. 1987).

"meant no more than it expressly stated." *Id.* at 226-27. *See also EEOC v. County of Orange*, 837 F.2d at 422; *EEOC v. Cargill*, 855 F.2d 682, 686 (10th Cir. 1988).

Thus, contrary to the Sixth Circuit's conclusion, Congress did not "expressly repudiat[e]" *McMann*—it merely supplied the express language on mandatory retirement which this Court found lacking in the statute. Therefore, this Court's *McMann* decision is still valid inasmuch as it concludes that an employee benefit plan which predates the ADEA cannot be a subterfuge to evade the Act. *EEOC v. Cargill, supra*; *EEOC v. County of Orange, supra*; *EEOC v. State of Maine, supra*; *International Brotherhood of Electrical Workers, Local 1439, AFL-CIO v. Union Electric Company, supra.*[6]

B. A Plan Which Is Justified By Age-Related Cost Factors Cannot Be A Subterfuge.

While cost justifications were not placed in evidence in this case, it should be made clear as part of this Court's treatment of these issues that age-based cost considerations can justify offering lesser or no benefits to older workers under an employee benefit plan, and such a plan is protected by § 4(f)(2). During the Senate hearings on the ADEA, Senator Javits articulated a need for flexibility in the bill as proposed, stating his concern that the bill intended to promote the hiring of older workers might in practice have the opposite effect and instead "may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have done so under a law granting them a degree of flexibility with respect to such matters." Hearings on S. 830 and S. 788 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (here-

[6] *See also Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d at 213; *Alford v. City of Lubbock, Texas*, 664 F.2d 1263, 1271 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) (dicta).

inafter Senate Hearings) at 24 (prepared statement of Sen. Javits); *see also id.* at 27 (testimony of Sen. Javits).

Immediately thereafter, Senator Smathers, who co-sponsored S. 830, testified in favor of an exception for employee benefit plans. Senate Hearings at 29-30 (Testimony of Sen. Smathers). Subsequently, the bills introduced in both the House and Senate for debate included § 4(f)(2). See 113 Cong. Rec. 34,738, 34,754 (1967). According to the Committee Report, the exception for employee benefit plans:

> serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vita [sic] to the legislation, and was favorably received by witnesses at the hearings.

H.R. Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in* 1967 U.S. Code Cong. & Admin. News 2213, 2217.

Then, during the Senate floor debates, Senator Javits once again explained, "The meaning of this provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers." 113 Cong. Rec. 31255 (1967).

It appears, therefore, that § 4(f)(2) was intended to authorize the *complete exclusion* of older employees from a retirement plan when appropriate. Discussions between the majority and minority managers of the bill, Senators Yarborough and Javits, confirm this conclusion.[7] Since

[7] "Mr. YARBOROUGH. I wish to say to the Senator that that is basically my understanding of the provision in line 22, page 20 of the bill, clause 2, subsection (f) of section 4, when it refers to retirement, pension, or insurance plan, it means that a man who would not have been employed except for this law does not have to receive the benefits of the plan. Say an applicant for employment

Congress intended to provide for the exclusion of older workers from a benefit plan by virtue of § 4(f)(2), it follows that differences in benefits available to older and younger workers justified by age-related cost factors, should also be eligible for the exemption. A demonstration of the cost considerations which formed the basis for the plan's distinctions will show that the plan was developed for those reasons rather than as an attempt to evade the act. Thus, even if cost justification for age-based distinctions are not mandatory, evidence that such justification was relied upon is sufficient to meet the employer's defense burden. *Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208 (4th Cir. 1982).

The use of age-related cost factors to justify age-based benefit restrictions has received the approval of Congress and the administrative agencies who have enforced the ADEA.[8] During discussion of the Conference Report on the 1978 amendments to the ADEA to prohibit mandatory retirement, Senator Javits, the primary employee advocate supporting the amendments, stated:

> Thus a retirement, pension or insurance plan will be considered in compliance with the statute *where the*

is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement." In other words, this will not disrupt the bargained-for pension plan. This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement or insurance plan.

Mr. JAVITS. I thank my colleague. That is important to business people." 113 Cong. Rec. 31255 (1967).

[8] As discussed above at part I, the controversy appears to be whether age-related cost factors are the *sole* means of justifying age limitations on benefits.

> *actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker*, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

124 Cong. Rec. S4450 (March 23, 1978) (emphasis supplied). Similarly, the Department of Labor's Interpretative Bulletin, which interprets the ADEA, states:

> Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide plan. . . A retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker, is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage. Further, an employer may provide varying benefits under a bona fide plan to employees within the age group protected by the Act, when such benefits are determined by a formula involving age and length of service requirements.

29 C.F.R. § 860.120, 34 Fed. Reg. 9709 (June 21, 1969).[9]

Numerous federal appellate courts have also approved the use of cost considerations to justify benefit differentials based on age. *Cf. Potenze v. New York Shipping Assn., Inc.*, 804 F.2d 235 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1955 (1987) (Social Security offset justified because it resulted in significant savings); *Cipriano v. Board of Education, supra* (since goal in offering early

[9] When ADEA enforcement authority was transferred to the EEOC, these regulations were continued in effect, *see* 44 Fed. Reg. 37974 (1979), but were later republished and redesignated as 29 C.F.R. § 1625.10, 52 Fed. Reg. 23811 (June 25, 1987).

retirement incentives is to save expenses, it is reasonable to offer more to younger employees); *Patterson v. Independent School District #709*, 742 F.2d 465, 469 (8th Cir. 1984) (for "the purpose of encouraging early retirement, the sliding scale of diminishing benefits is manifestly appropriate"). Thus, cost considerations can be used to justfy age differentials in an employee benefit plan.[10]

III. ONCE AN EMPLOYER HAS ARTICULATED A LEGITIMATE, NONDISCRIMINATORY BUSINESS REASON FOR MAINTAINING AN EMPLOYEE BENEFIT PLAN PROVIDING LESSER OR NO BENEFITS TO OLDER EMPLOYEES, THE PLAINTIFF HAS THE BURDEN TO PROVE THAT THE PLAN IS A SUBTERFUGE TO EVADE THE PURPOSES OF THE ADEA.

A. A Plaintiff's Prima Facie Case May Be Rebutted With Legitimate Reasons For the Employer's Conduct. The Plaintiff Must Then Prove Pretext.

An employee benefit plan which provides differing benefits to older workers is not a *per se* ADEA violation. In a series of Title VII decisions beginning with *McDon-*

[10] Even those courts that in particular cases have not found legitimate cost factors have recognized that where such factors exist, they constitute a § 4(f)(2) defense. *See EEOC v. Westinghouse*, No. 86-1226, slip op. at 29 (3d Cir. November 30, 1988) and cases cited therein. Moreover, age-related cost factors are not the only acceptable reasons for maintaining an employee benefit plan which differentiates on the basis of age. In addition to cost considerations, other reasons may justify offering different benefits to older and younger workers as part of an employee benefit plan. *See, e.g., Potenze v. New York Shipping Association, Inc.*, 804 F.2d at 238 (non-age-based reasons); *Cipriano v. Board of Education*, 785 F.2d at 58 (legitimate business reason); *EEOC v. Home Insurance Co.*, 672 F.2d 252, 260 n.11 (2d Cir. 1982) (reasonable business explanations); *Smart v. Porter Paint Co.*, 630 F.2d at 495 (some evidence of purpose). As the Seventh Circuit emphasized in *Smart*, the reason "is not limited to economic or business purpose," and for example may instead be legal in nature. *Id.* at 496-97.

nell Douglas Corporation v. Green, 411 U.S. 792 (1973), and continuing through *Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777 (1988), this Court has consistently applied a three-step method of proof in employment discrimination cases to allow a plaintiff, when appropriate, to demonstrate disparate treatment and violation of employment discrimination laws.

McDonnell Douglas established the basic order of proof. As this Court explained in *Texas Department of Community Affairs v. Burdine*:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*, at 802, 93 S.Ct., at 1824. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*, at 804, 93 S.Ct., at 1825.

450 U.S. at 252-53. The Court in *McDonnell Douglas* enumerated the factors which make up the plaintiff's prima facie case in a claim of racial discrimination in hiring under Title VII. The specific requirements, however, necessarily will vary with the facts of the case. *McDonnell Douglas*, 411 U.S. at 802 n. 13.[11]

[11] For example, a plaintiff in an ADEA termination case must establish a prima facie case by showing that (1) he was a member of the protected class; (2) he was discharged; (3) he was qualified for the position; and (4) he was replaced by a younger person. *Ackerman v. Diamond Shamrock Corporation*, 670 F.2d 66, 69 (6th Cir. 1982). *See also Douglas v. Anderson*, 656 F.2d 528 (9th Cir. 1981) (an ADEA plaintiff satisfies the fourth prong of the *McDonnell Douglas* test by showing that he was replaced by a substantially younger employee with equal or inferior qualifications).

Once a prima facie case is established by the plaintiff, the burden of production then shifts to the employer to state its reasons for taking the contested employment action. *Burdine*, 450 U.S. at 253. *Id.* In so doing, the employer rebuts the presumption created by plaintiff's prima facie case, and the presumption then "drops from the case." *Id.* at 255, n. 10. Plaintiff will then have the opportunity to demonstrate that the employer's reasons were actually a "pretext for discrimination." *Id.* at 253. *See also Furnco Construction Corporation v. Waters*, 438 U.S. 567, 578 (1979). Under this proof scheme, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253. If the defendant articulates a legitimate, nondiscriminatory business reason for its employment decision after a prima facie case has been established, the burden of proof remains with the plaintiff to show that the proffered reason is a pretext for discrimination.

In short, the real issue in every employment discrimination case of disparate treatment is whether or not the employer has based an employment decision on an illegal criterion. When the employer has presented facially valid reasons for its conduct, the plaintiff must in turn show that those reasons "were in fact a coverup for a . . . *discriminatory* decision." *McDonnell Douglas*, 411 U.S. at 805 (emphasis supplied).[12]

B. This Burden Of Proof Scheme Applies To The ADEA, With The Burden Remaining On The Plaintiff To Prove That The Employer's Legitimate Reasons Were In Fact A Subterfuge.

The *McDonnell Douglas* burden of proof scheme has been relied upon in virtually every ADEA case of disparate treatment not involving § 4(f)(2). *See, e.g., Dale*

[12] *Accord Johnson v. Transportation Agency, Santa Clara County, California*, 107 S.Ct. 1442, 1449 (1987) (when an affirmative action plan is offered as the rationale for an employment decision, the plaintiff retains the burden of proving its invalidity).

v. Chicago Tribune Company, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 954 (1987) (discharge); *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983) (failure to promote); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) (discharge).

Numerous courts have applied *McDonnell Douglas* in interpreting the exception under § 4(f)(1) allowing employer conduct based upon reasonable factors other than age. For example, the Fifth Circuit in *Smith v. Farah Manufacturing Co., Inc.*, 650 F.2d 64, 67 (5th Cir. 1981), summarized the burden of proof under § 4(f)(1) as follows:

> If an ADEA plaintiff succeeds in proving his prima facie case, the employer must adduce proof that the plaintiff was discharged for good cause or because of some reasonable factor other than age . . . However, only the burden of producing evidence shifts to the employer. After the defendant goes forward with evidence that the discharge was based on some reason other than age, the plaintiff still bears the burden of persuasion to establish a case of discrimination by a preponderance of the evidence. (Citations omitted)

See also Loeb v. Textron, Inc., 600 F.2d at 1015-16 (*McDonnell Douglas* approach is appropriate for use in § 4(f)(1) [reasonable factor other than age] and § 4(f)(3) [employer's right to discharge or discipline for good cause] cases). The reasoning of these courts also supports the application of the *McDonnell Douglas* proof scheme to cases where the exception under § 4(f)(2) is raised by the employer to meet its burden of production.

Indeed, the Sixth Circuit previously employed a type of *McDonnell Douglas* approach in § 4(f)(2) cases involving mandatory retirement. In *Carpenter v. Continental Trailways*, 635 F.2d 578 (6th Cir. 1980), *cert. denied*, 451 U.S. 986 (1981), the court, noting that the plan in question "appears to have been adopted for the same

reason that many companies and governmental agencies have adopted optional retirement plans," found "no evidence that Trailways' retirement plan was adopted . . . as a stratagem or artifice." 635 F.2d at 581. It can be presumed that such "evidence" would have had to have been produced by the plaintiff. Likewise, affirming a grant of summary judgment in favor of the employer in *Thompson v. Chrysler Corporation*, 569 F.2d 989 (6th Cir. 1978), the Sixth Circuit observed that "the plaintiff made no showing of the existence of a genuine issue as to whether the plan under which she was retired is a subterfuge to evade the purposes of the Act." 569 F.2d at 992.

There is no persuasive reason why the *McDonnell Douglas* proof scheme is not applicable when the employer's action falls under the § 4(f)(2) exception. Section 4(f)(2) declares that "it [is] not unlawful . . . to observe the terms of a bona fide employee benefit plan . . . which is not a *subterfuge* to evade the purposes of [the ADEA]." 29 U.S.C. § 623(f)(2) (emphasis supplied). As noted above, this Court has already defined "subterfuge" as a "scheme, plan, stratagem, or artifice of evasion," *McMann*, 434 U.S. at 203, which requires employer conduct that is at least intended as a "pretext." It appears, therefore, that Congress intended to exempt from the ADEA's prohibitions action taken pursuant to a bona fide benefit plan as long as it is not a coverup for intentional discrimination.

The § 4(f)(2) "subterfuge" provision embodies the same concept as *Burdine*'s "pretext for discrimination." In either situation, once the employer has articulated a legitimate nondiscriminatory business reason for its actions, the plaintiff still has the opportunity to show that the employer's proffered reason was a ruse, and that the real intent was to discriminate. The Fourth Circuit adopted this approach in *Crosland v. Charlotte Eye, Ear*

and Throat Hospital. Holding that an employer satisfies its burden by showing a legitimate reason for the challenged provision, the court observed that the plaintiff could try to rebut by attempting to show that the plan instead was a continuing device to evade the ADEA, stating:

> [W]e hold that defendant may avoid liability for excluding claimant from the 1968 primary plan by establishing that the provision under which she was excluded was not a subterfuge to evade the purposes of the Act. We further hold that this may be done by proving that the provision was motivated by a legitimate business or economic purpose which, objectively assessed, reasonably justified it.
>
> By way of rebutting or avoiding this affirmative defense, it will of course be open to the claimant to attempt to show that instead of a business or economic purpose the actual motivation for her exclusion was an ongoing "scheme, plan, stratagem or artifice of evasion," *McMann*, 434 U.S. at 203, 98 S.Ct. at 450, designed to thwart the purposes of the ADEA, *i.e.* that the plan as it affected her *was* a subterfuge. Relevant for this purpose would be any evidence . . . that might bear upon the [defendant's] motivation.

686 F.2d at 215-16 (emphasis in original).

Thus, in a § 4(f)(2) case involving a challenge to an employee benefit plan, the plaintiff can make out a prima facie case by proving (1) that he was a member of the protected class; (2) he was refused a benefit; (3) he would have been eligible for the benefit but for his age; and (4) the benefit is provided to younger employees. Under *McDonnell Douglas* and *Burdine*, this creates a rebuttable presumption of intentional discrimination, and the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for so devising the terms of the plan.

The employer can meet this burden of production with evidence that the plan predated the ADEA or by explaining its non-age-based reasons for placing the age restriction in the plan. Once the employer comes forward with this evidence, "the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255.

Thereafter, as in Title VII or other ADEA cases, the plaintiff will have the opportunity to prove that the employer's proffered reason is in fact a "pretext for discrimination"—the plaintiff in a § 4(f)(2) situation must prove that the employer's conduct actually is a subterfuge to evade the ADEA. *Crosland*, 686 F.2d 208. Thus, the employer's burden is to articulate the reason for the age differential, and the burden of proving "subterfuge" remains with the plaintiff, where it belongs.

It would be inappropriate to place upon the employer asserting a § 4(f)(2) defense the burden of proving that the plan was not a subterfuge. Such a requirement would in fact force the employer to attempt to prove a negative —the absence of subterfuge—or the "absence of discriminatory motive," which this Court declined to do in *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. at 25 (1978). In fact, it places the entire burden of showing a lack of discrimination on the employer—and no onus whatsoever on the plaintiff to meet the ultimate burden of proving intentional discrimination, which under *Burdine*, "never shifts" from the plaintiff. 450 U.S. at 253. Forcing the defendant to *prove* "lack of subterfuge" in order to establish a § 4(f)(2) defense would make it far easier for a plainitff to succeed than if there were no ADEA exception for employee benefit plans.

It is not surprising that those courts which have placed the entire "subterfuge" burden on defendant employers have had significant difficulty explaining how, in fact, that burden can successfully be met. For example, having

determined in *EEOC v. Home Insurance Co.*, 672 F.2d 252 (2d Cir. 1982) that the "employer who invokes § 4 (f) (2) is required to disprove subterfuge," the Second Circuit noted that it expected the employer to offer "reasonable business explanations." 672 F.2d at 260 n. 11. Subsequently, in *Cipriano v. Board of Education*, the same court found there were legitimate reasons for the employer's age-based retirement incentive, but then still required the employer to "come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as it did." 785 F.2d at 58. In apparent recognition that this additional requirement lacked any rationale, the Second Circuit asked that the EEOC participate in the case on remand or issue guidelines to help the court determine the "meaning of subterfuge," thus leaving employers completely confused as to their proof obligations under § 4(f) (2). *Id.* at 59.

This confusion can be eliminated, however, by this Court holding that where an employer shows a legitimate reason for providing lesser or no benefits to older employees, that showing will suffice to meet any burden which can reasonably be placed on an employer of showing lack of a discriminatory motive. Once that showing is made by the employer, it should be incumbent upon the plaintiff to attempt to show the presence of unlawful intent. This analysis, once again, is consistent with the *McDonnell Douglas/Burdine* formulation and provides the only sensible application of the "subterfuge" language found in § 4(f) (2).

CONCLUSION

For the reasons stated, EEAC respectfully submits that the decision of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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